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In The
*Supreme Court of the United States*
October Term, 2000

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CIRCUIT CITY STORES, INC.,
*Petitioner,*

v.

SAINT CLAIR ADAMS,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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# BRIEF OF *AMICUS CURIAE*, THE COUNCIL FOR EMPLOYMENT LAW EQUITY, IN SUPPORT OF THE PETITIONER

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## INTEREST AND CONCERN OF THE AMICUS[1]

The Council for Employment Law Equity ("CELE") is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices, and to the promotion of such employment practices in the employer community; before the judicial, legislative, and executive branches of government; and to the public at large.

The CELE includes in its membership Franklin Templeton Funds, Fujitsu America, General Electric, Halliburton, Masco, and Philip Morris, all of whom participated in this brief and all of whom have adopted successful Alternative Dispute Resolution ("ADR") programs with an arbitration component for resolution of employment disputes.

## SUMMARY OF THE ARGUMENT

In reversing the U.S. District Court, the Ninth Circuit has adopted a unique and untenable interpretation of the Federal Arbitration Act's Section 1 exclusion.[2] This decision, if not reversed, will, for many employers, create havoc in employee relations, effectively dismantle their dispute resolution programs, and increase their litigation exponentially. Moreover, it will further strain our judicial system – and unnecessarily so.

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Council for Employment Law Equity, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Letters of consent are filed with this brief.

[2] 9 U.S.C. § 1 (1994).

Alternative Dispute Resolution programs, with an arbitration component, represent a progressive and appropriate response to the explosive growth in litigation – especially employment litigation – in our country. ADR programs serve the interests of both employers and employees. In ADR programs, more complaints are raised and resolved, and they are resolved in a much more expeditious, civil, constructive, and cost-effective manner than complaints which are dealt with under our normal judicial system. Conflict avoidance and conflict resolution are the hallmarks of such ADR programs. Everyone wins – except the trial attorneys. Perhaps most importantly, workplace practices are corrected or altered so that small issues do not escalate into bigger issues, and co-workers are not subject to the same issues which first gave rise to the complaint.

For these and other reasons, workplace ADR programs – which most often include various levels of conflict resolution, including informal mediation, formal mediation, and/or arbitration – have become increasingly common and effective. Arbitration, already an integral part of employee relations in a union setting, is fast becoming a staple in the non-union private sector – *and* in the public sector.

A dangerous threat to this worthwhile employment practice stands in the form of the Ninth Circuit's *Circuit City Stores* decision,[3] an aberration on the legal landscape and an adventure in creative interpretation. If affirmed, the Ninth Circuit's decision would insert tremendous unpredictability and inconsistency into the workplace arbitration process, replace well-functioning federal procedures with a helter-skelter mosaic of state laws with legally questionable applicability, dissuade many employers from adopting or continuing ADR/arbitration

[3] 194 F.3d 1017 (9th Cir. 1999).



programs, and ultimately severely undermine a process by which many more employees have many more complaints addressed and resolved in a quick, fair, relatively painless, and highly effective way.

For numerous compelling legal and public policy reasons, the Ninth Circuit Court of Appeals decision in *Circuit City Stores* should be reversed, and employers and employees in the Ninth Circuit should have their rights and responsibilities restored, under the FAA, consistent with the rights and responsibilities of employers and employees in the 41 other states not in the Ninth Circuit.

## ARGUMENT

### I. Alternative Dispute Resolution Programs, With An Arbitration Component For Employment Disputes, Typically Have Substantial Procedural Safeguards To Protect The Rights Of Employees And All Parties.

#### A. The FAA Provides For Meaningful Judicial Review.

Many forms of ADR are either advisory or are processes by which the parties themselves arrive at a constructive solution to their problems. Some parties, who might otherwise use ADR, hesitate to submit their claims to binding ADR processes because they fear ADR will provide no legal redress to the party dissatisfied with the decision. While it is true that judges grant arbitration awards great deference,[4] such decisions are not immune from review.

[4] *See AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir. 1991), *cert. denied*, 502 U.S. 942 (1991).

Courts may refuse to enforce arbitration awards that were procured by fraud or undue means.[5] Section 16 of the FAA establishes the means for appellate review of arbitration awards,[6] while § 12 contains procedures for vacating, modifying, or correcting the award.[7] Therefore, the FAA itself contains the requisite procedural mechanisms for dispensing with unjust arbitration outcomes.

In addition, other avenues of review are available. For example, an employee has the option, for discrimination or harassment complaints, of petitioning the Equal Employment Opportunity Commission ("EEOC") to bring suit on his or her behalf at any time during the ADR process, including *after* the arbitration decision. Thus, the public policy role for the EEOC remains intact, and is recognized by employers and allowed for in ADR programs.

Common law also provides means of redress. A judicially created doctrine permitting vacatur exists for circumstances in which the arbitrator acts in manifest disregard of the law.[8]

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[5] *See* 9 U.S.C. § 10, which provides that an award may be vacated where the award was procured by corruption, fraud, or undue means; where the arbitrator was partial or corrupt, or where the arbitrators were guilty of misconduct; or where the arbitrators exceeded their powers or failed to execute a mutual, final, and definite award.

[6] 9 U.S.C. § 16.

[7] 9 U.S.C. § 12.

[8] *See Williams v. CIGNA Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999), *cert. denied,* 120 S. Ct. 1833 (2000), *citing First Options v. Kaplan*, 514 U.S. 938 (1995) (recognizing that arbitration awards may be set aside where they are in manifest disregard of the law).



Therefore, although arbitration awards are given significant deference, dissatisfied parties do have available significant alternatives to seek redress.

### B. Most In-House ADR Programs Incorporate Substantial Procedural Safeguards.

In addition to the FAA's statutory safeguards, employees are afforded substantial *additional* procedural protections and benefits by most ADR programs themselves. ADR programs typically are designed with the intention of promoting satisfactory conflict resolution for all parties involved, and quite obviously work best when all parties "buy in" to the concept and practice. The credibility of an ADR program resides exclusively on its balance, safeguards, and fairness – and the more credible a program, the more likely it is to be utilized.

Because dispute resolution programs are not adversarial, employees are aided – both procedurally and financially – in the grievance process. For example, most corporate ADR programs are designed as a series of steps – including informal and formal mediation – leading up to arbitration. These programs address a *much* broader range of grievances than would be addressed by legal causes of action, and therefore provide employees with redress for complaints which would otherwise remain unresolved. Such inclusive grievance procedures usually begin with informal meetings or discussion, enabling a number of disputes to be resolved immediately. However, if the problem persists, in-house ombudsmen often attempt conciliation prior to outside mediation and/or arbitration. If the grievance does advance to arbitration, many ADR programs pay – or at least subsidize – the employee's legal fees.

For example, Halliburton, a leading international energy services firm, has implemented a highly successful, and widely imitated, Dispute Resolution Program ("DRP"). Halliburton's DRP is a four-option program providing multiple processes – both inside and outside the Company – for resolving employee complaints. The DRP encourages collaborative approaches to dispute resolution by offering multiple channels for direct talk, or negotiation, and for both informal and formal mediation. Most disputes are resolved within a month through the in-house options.[9] To ensure its independence, the DRP reports to a Dispute Resolution Policy Committee composed of senior executives, rather than to a department or a single individual, and has been submitted to repeated outside independent audits.

Halliburton's DRP, like other ADR programs, recognizes that an employee complaint may involve a statutory right. Therefore, the Company allows an employee to consult with a lawyer or other advisor at any time during the ADR process, and pays the participating employee's legal fees up to $2,500 per year. If the employee opts not to use an attorney during arbitration, the Company will participate without one as well.

Another example of a highly successful and respected ADR program is the program implemented by Philip Morris. Like Halliburton's DRP, the Philip Morris ADR program incorporates a series of procedural steps, beginning with an Open Door Policy ("ODP") and proceeding to outside arbitration. The ODP is a preventative policy whereby employees are encouraged to voluntarily discuss their grievances with immediate

[9] William L. Bedman, *Alternative Dispute Resolution*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR, ch. 7 (1997).



supervisors or high level managers without fear of retaliation. If this step fails to resolve an issue, a Human Resources representative serves as a neutral facilitator between the conflicting parties.

If the employee requests the third and fourth steps of the program – mediation and arbitration – the employee pays a $250 filing fee, which is waived if the employer is the one to request either procedure. Philip Morris pays all other administrative and processing fees. The Philip Morris Dispute Resolution Benefits Plan ("DRBP") enables employees to consult with attorneys of their choice, and, upon approval, pays 80 percent of the employee's legal fees up to $1,000, and/or the mediator's fees up to $2,500, for a combined maximum of $3,500 per employee per dispute.[10] The employee also participates in choosing the third-party, neutral arbitrators to preside over their dispute.

Other common features of ADR programs include the use of peer review panels, toll-free assistance hotlines, certified mediators and arbitrators, access to the same remedies available in court proceedings, and the use of formal – and equal – discovery procedures.

Because ADR programs are overwhelmingly successful and increasingly popular, withdrawing such innovative grievance resolution systems from the FAA's coverage would severely jeopardize such innovative polices and programs.

[10] Eric A. Taussig, *Predispute Arbitration Agreement: The Philip Morris Program*, PROCEEDINGS OF NEW YORK UNIVERSITY 49TH ANNUAL CONFERENCE ON LABOR, ch. 8 (1997).

## II. Our Well-Established National Labor Policy Strongly Supports The Use Of Arbitration Agreements In Employee Relations.

It is clear that Congress's intent in enacting the FAA was to encourage the use of arbitration.[11] Since its enactment in 1925,[12] and codification in 1947,[13] the use of arbitration in the private and public sectors has flourished.

A number of recent legislative and executive branch initiatives have reaffirmed our nation's commitment to, and acceptance of, ADR. Such measures include the Civil Rights Act of 1991 ("CRA"),[14] in which Congress specifically endorsed the arbitration of Title VII[15] cases. Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including… arbitration, is encouraged to resolve disputes arising under [Title VII]."[16] Not long before, Congress had adopted virtually identical language in the Americans With Disabilities Act ("ADA").[17]

Additionally, the Administrative Dispute Resolution Act ("ADRA") – passed in 1990 and subsequently amended and permanently reauthorized in 1996, and amended again in 1998 – mandates that federal agencies create internal ADR programs. The 1998 amended

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[11] *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[the FAA's] purpose was to reverse the long-standing judicial hostility to arbitration agreements… and to place arbitration agreements upon the same footing as other contracts."

[12] 43 Stat. 883.

[13] *Supra* note 2.

[14] Pub. L. No. 102-166.

[15] 42 U.S.C. §§ 2000e *et seq.*

[16] 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. § 1981.

[17] 42 U.S.C. § 12212.



ADRA[18] requires each U.S. District Court to adopt local rules regarding the use of ADR. The ADRA's Findings and Declaration of Policy notes that:

> Alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.[19]

Additionally, many government agencies have implemented ADR programs governing their own employees. The United States Department of Agriculture's ADR program, for example, has an overall resolution rate of 82 percent, and the time from request for ADR to actual mediation averages 24 days.[20] The Federal Election Commission resolved all 26 employee complaints brought to the agency's Equal Employment Opportunity director in a recent three-year period.[21] Other government agencies to benefit from ADR programs include the Department of Labor, Department of Treasury, United States Mint, Army Corps of Engineers, Navy, Air Force, Postal Service, Department of State, and Department of Veterans Affairs.

That the federal government is so widely committed to the use of ADR for its own employees emphatically underscores the appropriateness of ADR use in private-sector employment.

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[18] Pub. L. No. 105-315.

[19] Pub. L. No. 105-315, § 2(1).

[20] John Ford, *Workplace ADR: Facts and Figures from the Federal Sector*, published at http://www.conflict-resolution.net/articles/Ford3.cfm.

[21] *Id.*

## III. To Uphold The Ninth Circuit's Decision Would Undermine And Disrupt An Employment Practice – A Multi-Step Alternative Dispute Resolution Program Culminating In Binding Arbitration – Which Is An Integral Part Of Employee Relations In The United States Today.

### A. Arbitration Of Employment Disputes Is Increasingly Common And Well-Entrenched In The Workplace.

The FAA and interpretative case law clearly indicate the strong federal policy in favor of arbitration as an alternative to litigation to resolve legal disputes. Employers have wisely responded by implementing innovative Alternative Dispute Resolution programs that fairly and efficiently resolve disputes at, or proximate to, their inception.

The cost, speed, and efficiency of resolving disputes outside of the courtroom have inspired many organizations to implement these in-house ADR programs. According to the United States General Accounting Office ("GAO"), in 1995, approximately ten percent of employers were using arbitration for employment disputes, and 8.4 percent were considering establishing such a system.[22] In 1997, this number increased by almost 90 percent to 19 percent of employers.[23] In a survey of more than 530 corporations in the Fortune 1000, more than 23 percent of respondents reported that they use ADR for non-union employment

[22] U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995).

[23] U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997).



dispute resolution.[24] Of those companies using ADR, approximately 80 percent have used mediation, and 19 percent have used arbitration, to handle matters including discrimination complaints.[25]

In recent years, more than 40 major corporations have implemented such programs.[26] These ADR programs are in place to address the needs of more than two million U.S. employees.[27] The American Arbitration Association ("AAA") alone has exercised jurisdiction over ADR programs for more than three million employees.[28] Thus, the use of ADR is firmly entrenched in our country's workplace culture.

[24] Lipsky, David and R. Seeber, *The Use of ADR in U.S. Corporations: Executive Summary* (1997). The survey was conducted by Price Waterhouse and Cornell University's PERC Institute on Conflict Resolution.

[25] Philip Zimmerman, *In-House Dispute Resolution Programs*, CPA JOURNAL (March 1998).

[26] Evan J. Spelfogel, *Pre-Dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, 71 NEW YORK STATE BAR JOURNAL No. 7, 22 (1999). (Among the major U.S. companies that have successfully implemented ADR programs are: American General, Bear Stearns, Bechtel, Chevron, Credit Suisse First Boston, DaimlerChrysler, Franklin Templeton Funds, Fujitsu America, General Electric, Halliburton, Hallmark, Hughes Electronics, International Paper, J.C. Penney, LensCrafters, Masco, McGraw Hill, Philip Morris, Polaroid, Rockwell International, Solomon Smith Barney, Shell Oil, Texaco, TRW, Ultramor Diamond Shamrock, and UPS.)

[27] *Id.*

[28] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RIGHTS L. REV. 29, 31 (Fall 1998).

**B. Arbitration, And Alternative Dispute Resolution Programs In General, Have Been Widely And Enthusiastically Embraced Not Only By Employers, But By Employees And Unions As Well.**

Many employers implement in-house ADR programs hoping to reduce legal fees, decrease employee turnover, and improve employee relations.[29] In-house programs often enable the parties to voice their concerns and craft mutually agreeable solutions to their problems in a more constructive, less contentious, and more expeditious way, thus helping to preserve the employment relationship. Typically, jobs are saved, not lost. More employee complaints are addressed,[30] and they are addressed and resolved more expeditiously. Moreover, inappropriate practices are more likely to be corrected, and resolution can be reached prior to escalation to a level which would be more detrimental and/or disruptive to more parties.

For example, Halliburton credits the implementation of its in-house Dispute Resolution Program with saving its employment relationship with more than 300 employees.[31]

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[29] *See, e.g.*, John Zinsser, *Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist*, NEGOTIATION J. at 151, 153 (April 1996).

[30] For example, the Halliburton Dispute Resolution Program, which covers more than 40,000 employees in the United States, has experienced a steady and significant increase in employee complaints filed since its inception in June 1993. The number of employee complaints addressed by the DRP has increased from 369 in 1994 (its first full year of operation) to 890 in 1999, and is projected to further increase to more than 1,000 this year. Moreover, the number of employee complaints processed by the DRP has more than doubled the number of formal employee complaints filed *prior* to the DRP's inception.

[31] *See supra* note 9 at 161.



Additionally, the cost of administering ADR programs is far outweighed by the litigation savings.[32] Therefore, both employers and employees derive substantial benefits from the implementation of effective ADR programs.

Employees significantly benefit from ADR. The Princeton Survey Research Associates found that 83 percent of American workers favor arbitration.[33] One reason is that not only are disputes resolved more quickly and cheaply, but often the "after dispute" employment relationship is preserved. ADR is often less contentious and more accessible than the court system – and thus the employment area is particularly suitable for ADR.

Some experts believe ADR benefits employees – especially those with modest financial resources – more than it benefits employers. Noting that employees often prefer swift, less expensive, private relief to participating in "test" cases, three former EEOC officials, including a former EEOC Vice Chairperson, concluded that, "[t]he reality is that a more informal, simpler, and less confrontational system like ADR will encourage more valid complaints of discrimination to come forward. For many individuals, ADR expands access to the legal system."[34] In fact, employers often find that more employee grievances are raised and addressed when ADR programs are available.[35]

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[32] U.S. General Accounting Office, Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace 2 (1997).

[33] *See* PRINCETON SURVEY RESEARCH ASSOCIATES, *Worker Representation and Participation Survey Focus Group Report*, Princeton, N.J. (April 1994).

[34] R. Gaull Silberman, Susan Murphy, and Susan Adams, *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1553, 1558 (1994).

[35] *See, e.g., supra* note 29.

Employees also benefit by agreeing to submit disputes to arbitration *before* conflict arises. Citing the findings of the Commission on Worker-Management Relations (the "Dunlop Commission"), University of Michigan Law School Professor Theodore J. St. Antoine suggests that employers are unlikely to agree to binding arbitration *after* a dispute is filed in court because, in most cases, the claim will go nowhere or the employer will prevail on summary judgment.[36] As a result, most employees' discrimination cases never reach a judicial hearing on the merits. "For employers, the desired trade-off [in consenting to pre-dispute arbitration] is the one big case against the many smaller ones."[37] Additionally, as discussed in § VI.C. of this brief, the delay and expense in pursuing employment-related claims through litigation often robs employees of a viable dispute resolution forum.

## IV. If The FAA Is Not Applicable To Employment Arbitrations, A Highly Inconsistent And Contradictory Patchwork Of State Laws Will Apply.

### A. Many State Arbitration Statutes Are Hostile – In Purpose And/Or Practice – To The Federal Arbitration Act.

State arbitration laws are, quite literally, "all over the map" – especially in regard to employment arbitrations. While many state statutes embrace the letter and spirit of the FAA,[38] many do not.[39]

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[36] Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 THOMAS M. COOLEY LAW REV. 1, 8, (1998).

[37] *Id.*

[38] *See, e.g.*, Colo. Rev. State. § 13-22-203; Del. Code Ann. tit. 10 § 5701; D.C. Code Ann. § 16-4301 (1981); 710 Ill. Comp. Stat. 5/1; Ind. Code. 34-4-2-1; Me. Rev. Stat. Ann. § 5927; Mass. Gen. Laws. Ann. ch. 150C § 1; Nev. Rev. Stat. § 38.035; Rev. Mont. Code Ann. § 27-5-113; N.D. Cent. Code § 32-29.2-01; 42 Pa. Code Stat. Ann. § 7302; S.D. Codified Laws. § 21-25A-1; Tenn. Code. Ann. § 29-5-307; Va. Code Ann. § 8.01-581.01; and Wyo. Stat. Ann. § 1-36-103.

[39] *See, e.g.*, Alaska Stat. § 09.43.010; Ariz. Rev. Stat. § 12-1517; Ark. Code Ann. § 16-108-201(b); Ga. Code Ann. § 9-9-2; Idaho Code § 7-901; Iowa Code § 679A; Kan. Stat. Ann. § 5-401; Md. Cts. & Jud. Pro. § 3-206; Mich. Comp. Laws Ann. § 600.5001(3); N.H. Rev. Stat. Ann. § 542:1; N.C. Gen. Stat. § 1-567.2; Okl. St. Ann. tit. 15 § 818; Ore. Rev. Stat. § 243.650 et. seq.; R.I. Cen. Laws § 10-3-2; S.C. Code Ann. § 15-48-10; Tex. Civ. Prac. § Rev. Code Ann. § 171.001; Wash. Rev. Code § 7.04.010; and Wis. Stat. Ann. § 788.01.



To the extent that states such as California, Georgia, Alabama, and Nebraska would be hostile to the enforcement of arbitration agreements, this would conflict with the clear national policy in favor of the use of arbitration and ADR, and contradict the Congressional intent of the FAA itself.

It was not – and is not – the intent of Congress for the states to frustrate the purposes of the Federal Arbitration Act, and/or to act at cross-purposes with the pro-arbitration policies this statute seeks to expand and enhance.

In the absence of FAA applicability – which would result if the Ninth Circuit were upheld – a substantial minority of states' current laws would prohibit the many active ADR programs which have been implemented in good faith, embraced by employers and employees alike, and effectively utilized to the benefit of all parties over a significant period of time.

### B. Multi-State Employers Need Uniform Policies And Programs.

National companies want – indeed, need – *national* employment policies in critical areas, such as Alternative Dispute Resolution.

Inconsistency state-to-state in the application, enforcement, administration, and negotiation of such policies often would be impractical and infeasible. Issues regarding employees who split their work time between two or more states, or between headquarters and field site assignments, or who are frequently transferred would create havoc for employers with ADR programs. The national policies favoring mediation and arbitration would be undermined, many employers would be dissuaded from adopting or continuing ADR programs, and fewer arbitrations would directly translate into more litigation – and a corresponding increased strain on our backlogged and overburdened judicial system.

National employers with ADR programs make a major commitment in implementing such a program in training, administration, communication, and – perhaps most significantly – transitioning of their corporate cultures. To abandon such a commitment – and investment – or to chip away at it piecemeal for the various operations in states with laws hostile to arbitration, would be unnecessarily and inappropriately destructive of a worthwhile employment practice and harmonious employee relations.

Employers with ADR programs – and their employees – *need* consistency of law, uniformity of their policies and programs, and a centralization of such ADR functions as training and administration if such programs are to remain effective and cost-effective. The Ninth Circuit's decision, if upheld, would undermine these needs.



### C. Our Arbitration Law, Like Our Pension And Labor-Management Relations Laws, Requires National Uniformity.

If the Ninth Circuit's decision in *Circuit City* is upheld, for one small but critical area of jurisprudence, legal chaos may ensue.

The Uniform Arbitration Act[40] has not been enacted "uniformly" in all jurisdictions – far from it. For example, there is a wide range of various public policy exceptions state-to-state, and state arbitration statutes are as varied as the colors of the rainbow.

Foremost among employer concerns, if the Ninth Circuit is upheld, would be the inconsistent – and somewhat unpredictable – determinations that would ensue without FAA regulation. Employers and employees would be routinely subjected to a bifurcation of proceedings – one in court, one in arbitration – necessitating some form of collateral estoppel.

For example, as discussed below,[41] if *Circuit City* is upheld, a company's arbitration program may only cover contractual claims, but not discrimination claims. A breach of contract claim would go before an arbitrator, while an age discrimination claim would go – *at the same time* – to court.

As a result, there would be increased friction within the legal system – arbitration, state court, federal court – a bifurcation of legal actions, and a premium on which claims are decided first.

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[40] The Uniform Arbitration Act has been adopted in varying forms in all 50 states, plus the District of Columbia.

[41] *See infra* § V of this brief.

What is possible – indeed likely – is a volley of legal maneuvers back-and-forth, duplicative procedures, and contradictory results. Moreover, the strain on the parties, their resources, and the legal system would be multiplied.

Some areas of law – quite obviously – are most appropriate for federal jurisdiction and federal preemption, and the consistency, predictability, and streamlining that comes with it. Arbitration, as recognized by Congress in enacting the Federal Arbitration Act, is one of them.

Like our pension and labor-management relations laws, which provide for national uniformity through ERISA[42] and §301 of LMRA,[43] preemption of anti-arbitration state laws by the FAA is both necessary and appropriate. Just as employers – and their employees – would be faced with a patchwork of inconsistent and contradictory state laws if the National Labor Relations Act did not preempt state labor-management relations laws, so too would employers and employees stand in such legal quicksand if our arbitration laws were "defederalized."

## V. <u>If The Federal Arbitration Act Is Held To Be Inapplicable To Employment Arbitrations, State Arbitration Statutes May Be Inapplicable To Federal Claims</u>.

Should the Ninth Circuit be upheld in *Circuit City*, and thus the FAA be held inapplicable to employment arbitrations, a legal argument is likely to be repeatedly raised that state arbitration laws would *not* be applicable to federal employment claims, such as claims of employment discrimination under Title VII,[44] the Age Discrimination in

[42] 29 U.S.C. § 301 *et seq.*
[43] 29 U.S.C. §§ 141 *et seq.*
[44] 42 U.S.C. § 2000e-2.



Employment Act,[45] and the Americans with Disabilities Act.[46]

Although the pro-ADR, pro-arbitration community generally would prefer that such state laws *were* applicable – in the absence of FAA coverage – a legal argument could be, and undoubtedly *would* be made again and again in various forums and jurisdictions that state arbitration laws are inapplicable to employment claims under federal statutes.

The Federal Arbitration Act, as interpreted by the Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[47] creates a strong presumption of arbitrability. The Court found that there needs to be express language in a statute to override this federal presumption of arbitrability. If the Court – by affirming the Ninth Circuit's decision – takes away that federal presumption, it is not at all clear that the states would have the right to require arbitration of federal claims.

At the least, states' rights to do so would be legally challenged repeatedly. What would likely result is a decade of litigation to reestablish order in an area of law that currently – with FAA applicability endorsed by *every* Circuit Court of Appeals with jurisdiction *except* the Ninth Circuit – is well-established and widely embraced, and is functioning equitably and efficiently.

Thus, the cause of states' rights may well be disserved by upholding *Circuit City*. In the end game, the states may *not* have the option of exercising arbitration jurisdiction over federal causes of action, regardless of the substance of state statutes or the will of state legislatures and courts.

[45] 29 U.S.C. §§ 621 *et seq.*
[46] 42 U.S.C. §§ 12101 *et seq.*
[47] 500 U.S. 20 (1991).

The resulting tragedy would be that arbitration of employment claims would *not* be covered by either federal (FAA) or state arbitration laws, to the great disadvantage of those served by ADR and arbitration overall.

Left out in the cold would be the millions of employees who currently *could* – and sometimes do – have their issues addressed and resolved, but who would have no such recourse in the barren legal tundra of an arbitration-less workplace landscape. Only those with access to a plaintiffs' bar which is committed to high-yield, big-issue litigation would find representation. Most employees do not fit that plaintiff's profile, and most employee grievances do not warrant such legal action. Most *do* warrant the informal mediation, formal mediation, and/or arbitration that ADR programs provide. However, in the legal environment the Ninth Circuit endorses – no Federal Arbitration Act coverage of employment arbitrations – such ADR programs would be an endangered species.

## VI. As A Matter Of Public Policy, The Promotion Of Arbitration Of Employment Disputes Is Both Necessary And Appropriate.

### A. The Court System Is Backlogged Due To Employment Lawsuits, And Employment Law Cases Create An Unnecessary Strain On The Limited Resources Of The Judicial System.

Employer interest in Alternative Dispute Resolution has grown correspondingly with the volume of discrimination charges filed both in the federal courts and with the Equal Employment Opportunity Commission.

In FY 1999, the reported number of employment discrimination charges filed with the EEOC totaled



77,444.[48] Private employment suits also grew at an astronomical rate. In January of this year, the Bureau of Justice Statistics ("BJS") published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.[49] Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that have flooded the U.S. District Courts in this period.[50]

The torrent of employment-related lawsuits coupled with the delays in case processing evince a need for more effective case management. Arbitration is well-suited to meet this need.

The federal judiciary appears to agree. The Alternative Dispute Resolution Act of 1998,[51] which was signed into law in October 1999, has promoted the use of ADR in the federal court system. This law mandates U.S. District Courts to establish their own ADR programs and authorizes the use of at least one form of ADR. Additionally, Recommendation 39 of the *Long Range Plan for the Federal Courts*[52] encourages U.S. District Courts to "make available a variety of alternative dispute resolution techniques, procedures, and resources to assist in achieving a just, speedy, and inexpensive determination of civil litigation."[53] Clearly, the intent of promoting ADR

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[48] EEOC Charge Statistics, as published and available at http://www.eeoc.gov/stats/charges.html.

[49] Marika F.X. Litras, "Civil Rights Complaints in U.S. District Court, 1990-98" (NCJ-173427). Employment discrimination cases increased from 8,413 filings in 1990 to 23,735 in 1998.

[50] *Id.*

[51] Pub. L. No. 105-315.

[52] See *New Law Authorizes ADR in All District Court*, THE THIRD BRANCH, published and available at http://www.uscourts.gov/ttb/feb99ttb/newlaw.html.

[53] *Id.*

methods within the court system is to lighten the federal court docket. Removing the FAA's coverage of employment agreements to arbitrate employee claims would undoubtedly exacerbate an already clogged and overburdened court system.

### B. Driving Workers To The Equal Employment Opportunity Commission And Private Attorneys Does Not And Will Not Decrease Employment Discrimination Or Better Protect Employees' Rights.

As previously discussed, the EEOC is constantly overwhelmed with employee complaints. Its limited resources, expanding backlog, and frequent staff turnover all impede productivity.[54]

Moreover, a majority of claims brought to the EEOC are never litigated. For instance, of the 97,846 charges resolved by the EEOC in FY 1999,[55] only 16,102 of these charges were deemed meritorious and/or resulted in outcomes favorable to the charging parties, including negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.[56] It should be noted that over a quarter of these "merit resolutions" – 4,837 – were in fact unsuccessful conciliations, whereby the EEOC closed the case after resolution attempts failed. Although considered "merit" resolutions by the EEOC because the agency finds evidence of discrimination in the charging party's claim, unsuccessful resolutions do not result in any monetary benefit to the charging party.

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[54] *See* Darryl Van Duch, *Paralysis for EEOC Feared*, NAT'L L.J., August 24, 1998, at 1, 21.
[55] *See* EEOC Charge Statistics, *supra* note 47.
[56] *Id.*



The EEOC found no reasonable cause to exist in 58,174 of these claims.[57] Another 23,570 claims were closed for administrative reasons, including the EEOC's failure to locate the charging party and the charging party's failure to respond to the EEOC's communications.

Even if a party's claim is deemed meritorious, the EEOC does not litigate all claims. In 1999, the EEOC filed 439 direct lawsuits against employers.[58] Nonetheless, despite the perceived legitimacy the EEOC brings to a federal employment case, plaintiffs prevail *much* less often with the EEOC on their side than they do in arbitration. One study found that the EEOC won only 24 percent of its employment cases, whereas individual employees in arbitration won 51 percent of *their* cases.[59] Therefore, availing oneself of the EEOC charge process not only takes considerable time – it also seldom results in a successful outcome for the employee who alleges discrimination.

Employees fare no better pursuing private suits. Although a common, unfounded concern among arbitration detractors is that the use of pre-dispute, binding arbitration agreements robs litigants of their "day in court" with a jury of their peers, the truth is that the overwhelming majority of cases are never tried and never reach a jury. In 1993, a total of 245,687 civil cases were concluded in U.S District Courts.[60] Only 1.8 percent, or 4,456, involved jury trials.

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[57] *Id.*
[58] EEOC Litigation Statistics, FY 1992 through FY 1999, published at http://www.eeoc.gov/stats/litigaiton.html.
[59] Gregory W. Baxter, *Arbitration or Litigation for Employment Civil Rights?* 2 INDIVIDUAL EMPLOYMENT RIGHTS 19 (1993-1994).
[60] *See* Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 854 (Fall 1998), *citing* Admin. Off. U.S. Ct., Federal Judicial Caseload Statistics, March 31, 1997, tbl. C-4.

Additionally, employee-plaintiffs usually do *not* prevail in jury trials. In fact, "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court."[61] In 1994, employee-plaintiffs won only 44 percent of jury verdicts in employment civil rights cases.[62] Of the 3,419 employment discrimination cases brought in 1994 in which the federal courts made a definitive judgment, 60 percent were dispensed of by pre-trial motions. Employers were the victors in 98 percent of these decisions.[63] In contrast, a study of employment *arbitration* cases conducted by the American Arbitration Association in 1992 found that employees prevailed in 73 percent of the cases they filed, and 64 percent of all cases.[64]

In another survey conducted by AAA, employees won their arbitration cases 63 percent of the time from 1993-1995.[65] Federal court employee litigants, by comparison, won only 14.9 percent of their cases in 1994.[66]

### C. Resolution Of Employment Disputes Is Achieved In A Faster, Cheaper, Less Intrusive, And More Confidential Way Through Arbitration Rather Than Litigation.

The cost of bringing a lawsuit has become prohibitive for many would-be employee-plaintiffs. This is due to both

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[61] Lewis Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, DISPUTE RESOLUTION MAGAZINE, 23-24 (Fall 1999).
[62] *Id.*
[63] *Id.*
[64] Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995).
[65] *Id.* at 210-213 (1997).
[66] Maltby, *supra* note 27 at 47.



the protracted nature of litigation, and the increase in attorneys' fees. Employee-plaintiffs frequently cannot afford plaintiffs' attorneys' hourly rates or retainers,[67] and a simple consultation fee alone can cost $300.[68] The cost of litigating employment suits is increasing at the rate of 15 to 20 percent annually.[69]

Although Title VII and other federal civil rights statutes include provisions for attorneys' fees,[70] the plaintiff must prevail to collect. Given the low plaintiff-employee win rates, plaintiffs' attorneys have diminished incentive to offer their services on a contingency basis. As a result, as many as 95 percent of employees who seek help from the private bar with an employment matter do not obtain counsel.[71]

The lifespan of an average employment case also has increased dramatically. According to the Federal Judicial Center, it takes almost two years (679.5 days) from the time an average case is filed in U.S. District Court until the date

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[67] Partner-level employment lawyers commonly charge hourly rates of $250-$350 or more. *See, e.g., Weeks v. Baker & McKenzie*, 74 Cal. Rptr. 2d 510 (Cal. App. 1998) (approving $300).
[68] Maltby, *supra* note 27 at 58.
[69] *Id.* at 62, *citing* James Dertouzous et al., *The Legal and Economic Consequences of Wrongful Termination*, at viii (1988).
[70] *See, e.g.*, 42 U.S.C. § 1988(b) (1998).
[71] Paul Tobia, *Alternative Dispute Resolution: Testimony Before the Commission on the Future of Worker-Management Relations* (1994). (The vast majority of would-be plaintiffs do *not* become plaintiffs under our judicial system, while *every* employee gets his or her grievance addressed under ADR programs. The plaintiffs' bar generally has negligible interest in marginal claims, disadvantaged clients, and/or potentially low-yield outcomes.)

of resolution.[72] Other surveys have found this to be a conservative estimate, finding instead that the average civil case lasts from two-and-one-half years[73] to eight years,[74] depending on the jurisdiction and the nature of the case.

Additionally, the EEOC is slow. In fiscal year 1997, the EEOC reported that it takes the agency nearly two years, on average, to process an employee's charge of discrimination.[75] Thus, litigation is not a means of achieving swift justice. In contrast, the average time frame for resolving an employment-related arbitration case is 8.6 months.[76]

Another benefit to arbitration is that it preserves the parties' confidentiality in a way that litigation cannot. ADR proceedings are not formally recorded or filed. Therefore, participants have the opportunity to resolve their disputes without undue concern about their privacy. Moreover, ADR processes are insulated from public scrutiny, and awards and hearing proceedings generally are kept confidential. ADR also allows the parties to be more open with one another during the process, and therefore may be less intimidating than traditional litigation.

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[72] Maltby, *supra* note 27 at 56.

[73] B. Mahoney et al., Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings, Vol. 8 (1985).

[74] *Evaluating and Using Employer-Initiated Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, Apr. 28-30) 875, 894 (1994).

[75] *Summary of Enforcement Data and Budget and Staffing Information for the EEOC: FY 1991 through FY 1997*, Office of Communications and Legislative Affairs, Equal Employment Opportunity Commission (Dec. 8, 1997).

[76] Maltby, *supra* note 27 at 56.



In summary, the speed, efficiency, reduced cost, and privacy of ADR benefits all parties involved. Removing employment agreements to arbitrate from the FAA's purview would therefore do a great disservice to both employers and employees, not to mention the overwhelmed EEOC and federal court dockets.

## VII. The EEOC Has Its Influence On Precedent-Setting Law Expanded And Enhanced The More Employment Discrimination Claims Are Addressed By Arbitrators Rather Than By Courts.

The current EEOC favors ADR generally, but is opposed to pre-dispute binding arbitration agreements. One prominent criticism of workplace ADR programs, including arbitration of employee complaints, is that they are at the price of "court-made" law. The opposite is true. The more arbitrations are used, the fewer the court cases – that is obvious. However, there is no dearth of employment litigation now, despite the ever wider use of ADR, given the explosive growth in employment litigation discussed earlier.[77] In fact, one-third of the current backlog in the federal court system is employment law cases,[78] representing the need *not* for more "court-made" law, but more *focused* "court-made" law.

Expanded use of ADR programs in the employment context – including arbitrations – represents just such an opportunity to sharpen the focus on which cases are most appropriate for precedential value, and for consideration by the courts *and the EEOC*.

If the number of private employment discrimination cases flowing into the courts is dramatically reduced –

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[77] *See* § VI.A. *supra*.

[78] *Id.*

whether because of increased use of arbitrations, or for any other reason – the EEOC will still be a party in just as many cases. Therefore, a higher percentage of EEOC cases would be shaping the law, and the influence of the EEOC on precedent-setting cases would be magnified.

After all, the resources of the EEOC are limited and always will be. On a workplace landscape where ADR is common and well-utilized, the EEOC would have *more* opportunity to advance the issues it deems most appropriate for the courts, and a *greater* concentration of authority in developing our equal employment laws.

## VIII. The EEOC Should Adopt A FAA-Regulated Deferral-To-Arbitration Process Parallel To The National Labor Relations Board's.

As a matter of policy, it is appropriate to consider the role of FAA-regulated arbitration in a *labor* context when considering arbitration in an *employment* context.

The National Labor Relations Board ("NLRB") has a well-established deferral-to-arbitration doctrine which was first articulated in *Collyer Insulated Wire*,[79] and has been repeatedly – and without exception – reaffirmed.[80] Under the "Collyer Doctrine," the NLRB routinely defers to the parties' grievance-arbitration process, and only reviews arbitration decisions under very limited circumstances.

There is a key difference: the NLRB defers in a setting where the grievant has union representation. However, the individual in an employment arbitration typically has access to legal counsel, and the employer frequently pays

[79] 192 NLRB 837 (1971).
[80] *See, e.g., National Radio*, 198 NLRB 527 (1972), and *General Am. Transp. Corp.*, 228 NLRB 808 (1977).



the employee's legal fees.[81]

Whether under the National Labor Relations Act ("NLRA")[82] or Title VII, the employee's statutory rights at stake are equally compelling: Is there a significant policy difference in protecting an employee's right *not* to be discriminated against based on his or her union activity vis-à-vis, for example, his or her age?

Currently – except in the Ninth Circuit as a result of *Circuit City Stores* – both the NLRA and Title VII arbitration processes are regulated by the FAA.

However, there is a substantial difference between the approaches of the NLRB and the EEOC. If an employee is fired for his or her union activities, he or she *cannot* have it adjudicated under the NLRA if the collective bargaining agreement has an arbitration provision. Furthermore, the Board will not defer under the "Collyer Doctrine" *unless* the arbitration is binding. The NLRB will only review the outcome of the arbitration if it is contrary to the purposes of the NLRA. (Similarly, the EEOC *could* choose to only review the outcome of an ADR arbitration if it is contrary to the purposes of Title VII or its related statutes.)

By contrast, the EEOC, under its current political configuration, opposes *binding* arbitration, reviews individual complaints at any time in the arbitration/ADR process, and has no formal deferral-to-arbitration policy.

A written agreement between the employee and the employer which provides consent to participate in Alternative Dispute Resolution, including arbitration of employment discrimination claims, *is* analogous to an

[81] *See* § I.B., *supra*.
[82] 29 U.S.C. §§ 151-69 (1988).

arbitration provision in a collective bargaining agreement. Both are consensual agreements involving arbitration of statutory rights, are subject to the FAA, and address fundamental employee rights which are equally deserving.

The EEOC, if it chose to do so, could adopt a *Collyer*-type deferral-to-arbitration doctrine. As a measure of the appropriateness of FAA applicability, and the utility of binding arbitration, the NLRB stands as a model for what could – and should – be the policy of its sister agency, the EEOC.

## CONCLUSION

For the foregoing reasons, the Council for Employment Law Equity respectfully urges the Court to reverse the Ninth Circuit Court of Appeals' decision in *Circuit City Stores, Inc. v. Saint Clair Adams.*

Respectfully submitted,

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